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In re Application of	:	OFFICE OF PETITIONS
Majid et al.	:	
Application No. 10/613,588	:	DECISION DISMISSING
Filed: July 5, 2003	:	PETITION
Attorney Docket No. USAV2003/0110	:	
US NP	:	

This is a decision on the petition under 37 CFR 1.10, filed October 10, 2003, requesting that the above-identified application be accorded a filing date of July 3, 2003, rather than the presently accorded filing date of July 7, 2003.

Petitioner asserted that petitioner deposited the above-identified application with the USPS using "Express Mail Service" on July 3, 2003, as evidenced by the signed certificate of mailing. In addition, petitioner noted that petitioner filed two related applications with the USPTO on the same day of July 3, 2003, using the same USPS Express Mail Service in two separate packages, both of which were assigned the correct filing date of July 3, 2003.

It is unclear from the petition if petitioner is alleging that there is a discrepancy between the filing date accorded by the United States Patent and Trademark Office (USPTO) and the date-in entered by the United States Patent and Trademark Office (USPS) (37 CFR 1.10(c)) or that the date-in was incorrectly entered by the USPS (37 CFR 1.10(d)). Therefore, the Office will treat this petition under both 37 CFR 1.10(c) and (d).

Paragraph (a) of 37 CFR 1.10 states that:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the

United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date. See §1.6(a) (Emphasis added).

Consideration under 37 CFR 1.10(c)

Paragraph (c) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show a discrepancy between the filing date accorded by the Office to the correspondence and the date of deposit as shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation, may petition the Commissioner to accord the correspondence a filing date as of the "date-in" on the "Express Mail" mailing label or other official USPS notation, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date other than the USPS deposit date;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail;" and
- (3) The petition includes a true copy of the "Express Mail" mailing label showing the "date-in," and of any other official notation by the USPS relied upon to show the date of deposit.

The present petition lacks the showing required by item (3) above. The "date-in" on the "Express Mail" mailing label No. EL816576588US is blank. Further, petitioner failed to provide any other official notation by the USPS to show the date of deposit as July 3, 2003.

Consideration under 37 CFR 1.10(d)

Paragraph (d) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) and fee(s) that constitute the correspondence prior to the original mailing by "Express Mail;" and
- (3) The petition includes a showing, which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

The present petition lacks the showing required by item (3) above.

Initially, the Office notes:

Correspondence should be deposited directly with an employee of the USPS to ensure that the person depositing the correspondence receives a legible copy of the "Express Mail" mailing label with the "date-in"

clearly marked. Persons dealing indirectly with the employees of the USPS (such as by deposit in an "Express Mail" drop box) do so at the risk of not receiving a copy of the "Express Mail" mailing label with the desired "date-in" clearly marked. The paper(s) or fee(s) that constitute the correspondence should also include the "Express Mail" mailing label number thereon.

37 CFR 1.10(b).

A grantable petition under 37 CFR 1.10(d) must include "a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in 'Express Mail Post Office to Addressee' service prior to the last scheduled pickup for that day." In addition, the showing "must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the 'Express Mail Post Office to Addressee' service of the USPS." Evidence from the USPS may be, for example, the Express Mail Corporate Account Mailing Statement or a statement by an appropriate official of the USPS that according to a USPS record the "date-in" on petitioner's Express Mail receipt is erroneous, accompanied by a copy of the relevant USPS record. Evidence that came into being within one day after the deposit of the correspondence as Express Mail may be, for example, a log book which contains information such as the Express Mail label number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and the date and time of the log book entry.

In support of petitioner's assertion, petitioner submitted a copy of the USPS Track & Confirm sheet, which indicated that a package bearing Express Mail label No. EL816576588US was delivered to the USPTO and received by R. Atiati at 11:09 am on July 5, 2003. Additionally, petitioner attempted to demonstrate that the above-identified application was deposited with the USPS on July 3, 2003, because petitioner filed two related applications with the USPTO on the same day of July 3, 2003, using the same USPS Express Mail Service in two separate packages. The Track & Confirm sheets for these related applications indicated that they were received by R. Atiati of the USPTO on July 5, 2003, and were assigned the filing dates of July 3, 2003. However, the fact that the USPTO accorded two related applications the filing date of July 3, 2003, has no bearing on this matter. The filing date for each application must be established based on direct evidence relating to each specific application.

The Office notes that petitioner bears the burden to prove that the "date-in" was incorrectly entered on the "Express Mail" mailing label. Petitioner has not provided any direct evidence of the delivery of the present application to the USPS on July 3, 2003. If the USPS deposit date cannot be determined, the correspondence will be accorded the date of receipt in the USPTO as the filing date. See MPEP 513. Therefore, absent evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail" service, which corroborates the allegation that the application was, in fact, deposited with the USPS on July 3, 2003, before the last scheduled pick-up for that day, the application will be accorded the date of receipt in the USPTO, July 5, 2003.

Accordingly, the petition is dismissed.

Any request for reconsideration must be filed within TWO (2) MONTHS of the date of this decision in order to be considered timely. See 37 CFR 1.181(f).

Further correspondence with respect to this matter should be addressed as follows and to the **attention of Senior Petitions Attorney Christina Tartera Donnell**:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By FAX: (703) 872-9306
 Attn: Office of Petitions

By hand: U.S. Patent and Trademark Office
 220 20th Street S.
 Customer Window, Mail Stop Petition
 Crystal Plaza Two, Lobby, Room 1B03
 Arlington, VA 22202

The Office of Initial Patent Examination is directed to correct the filing date of the above-identified application to July 5, 2003.

Telephone inquiries regarding this matter should be directed to the undersigned at (703) 306-5589.

Christina Tartera Donnell

Christina Tartera Donnell
Senior Petitions Attorney
Office of Petitions